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No. 87-294

IN THE

Supreme Court of the United States

October Term, 1987

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether a federal claim which was not presented to the Supreme Court of Alabama by an application for rehearing after the affirmance of the amount of damages, and which was not passed upon by that court, is within this Court's jurisdiction.

2. Whether an Alabama statute which increases the amount of damages awarded in civil cases if a judgment is superseded and affirmed on appeal, and which has since been abrogated by the state legislature, raises a substantial federal question.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT 3

I. THE FEDERAL CLAIM RAISED BY ALABAMA POWER COMPANY WAS NEITHER PROPERLY PRESENTED TO NOR PASSED UPON BY THE SUPREME COURT OF ALABAMA 3

II. THE FEDERAL QUESTION IS NOT SUBSTANTIAL 7

A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States 7

B. The Federal Question Is Not Substantial Because the Alabama Statute at Issue Has Been Abrogated 13

C. The Mississippi Statute at Issue in *Crenshaw* is Distinguishable from the Alabama Statute 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: *Page*

Atlanta, Birmingham & Coast R.R. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948) 10

Bankers Life and Casualty Co. v. Crenshaw, No. 85-1565 (probable jurisdiction noted March 9, 1987) 13

Black Belt Wood Co., Inc. v. Session, No. 84-1222 (Ala., Oct. 3, 1986; June 30, 1987) 5

Burlington Northern R.R. Co. v. Woods, ___ U.S. ___, 94 L.Ed.2d 1 (1987) 9

Chapman v. Rivers Constr. Co., 284 Ala. 633, 227 So.2d 403 (1969) 6

City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950) 8

Clements v. Fashing, 457 U.S. 957 (1982) 8

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948) 7

Dandridge v. Williams, 397 U.S. 471 (1970) 8

Davison v. Mobile Infirmary, Nos. 84-1183, 84-1231, 84-1232 (Ala., Oct. 3, 1986; July 24, 1987) 5

Dependable Ins. Co. v. Kirkpatrick, No. 85-1150 (Ala., May 1, 1987; June 26, 1987) 6

Devito v. Imbriano, 30 A.D.2d 796, 332 N.Y.S.2d 577 (1972) 11

Empire State Ins. Co. v. Chafetz, 302 F.2d 828, 830 (5th Cir. 1962) 10

Farmers' and Merchants' Ins. Co. v. Dobney, 189 U.S. 301 (1903) 11

Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986) 3

TABLE OF AUTHORITIES — (Continued)

Cases: *Page*

Harmon v. Motors Ins. Corp., Nos. 83-1406, 84-8, 84-9 (Ala., July 11, 1986; June 19, 1987) 5

Heart v. Judson, Minor 135 (Ala. 1823) 8

Illinois v. Gates, 462 U.S. 213 (1983) 7

Johnson v. Barnes, 250 Ala. 292, 34 So.2d 144 (1948) 7

Life and Casualty Ins. Co. of Tennessee v. McCray, 291 U.S. 566 (1934) 11

Lindsey v. Normet, 405 U.S. 56 (1972) 7, 12

Louisville & Nashville R.R. Co. v. Stewart, 241 U.S. 261 (1916) 10, 13

Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920) 9

Ortwein v. Schwab, 410 US. 656 (1973) 7

Postow v. OBA Federal Savings & Loan Association, 627 F.2d 1370 (D.C. Cir. 1980) 11

Reinhardt Motors, Inc. v. Boston, No. 85-6 (Ala., Oct. 3, 1986; May 15, 1987) 6

United States v. Kras, 409 U.S. 434 (1973) 7

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 8

Williamson v. Lee Optical, 348 U.S. 464 (1955) 11

Constitutions, Statutes and Rules:

U. S. Const. Amend. VIII 3

U. S. Const. Amend. XIV (Equal Protection Clause) ..... *passim*

Rule 16, Rules of the Supreme Court of the United States 1, 7

TABLE OF AUTHORITIES — (Continued)

Constitutions, Statutes and Rules: *Page*

Ala. Code § 12-22-72 (1975) ..... *passim*

1987 Ala. Acts Nos. 87-164, 181, 182, 183, 184, 185, 186, 187, 188 and 189 ..... 10, 13

Miss. Code Ann. § 11-3-23 (Supp. 1986) 5

Rule 40, Ala. R.App.P. 2, 4

Publications:

16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4022 (1977) 7

Comment, *Mandatory Assessment of Damages Against an Unsuccessful Appellant: A Constitutional Analysis,* 53 Miss.L.J. 281 (1983) 13

IN THE

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No. 87-294

ALABAMA POWER COMPANY,
Appellant,

v.

BRENDA LOUISE CANTRELL,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellee moves to dismiss this appeal on the grounds that (1) the federal question sought to be reviewed was not timely and properly raised before the Supreme Court of Alabama and was not passed on by that court; and (2) the federal question presented is not substantial.

STATEMENT OF THE CASE

In this case, Alabama Power Company seeks this Court's review of the constitutionality of Ala. Code § 12-22-72 (1975). On March 27, 1985, the Circuit Court of St. Clair County, Alabama, entered judgment against Alabama Power Company. App. E, A-37.[1] The Circuit Court denied Alabama Power Company's post-judgment motions on July 1, 1985. App. D, A-36. After appeal, the Supreme Court of Alabama issued its first opinion on September 5, 1986, affirming liability but remanding to the trial court the issue of excessiveness of damages. App. A, A-2. Alabama Power Company's application for rehearing — filed September 19, 1986 — raised, *inter alia*, the issue of the constitutionality of § 12-22-72 even though the Supreme Court of Alabama had not yet affirmed the judgment, i.e., the issue of amount of the judgment was not yet decided. App. G, A-41.

On November 6, 1986, the Circuit Court issued an opinion pursuant to the remand instructions of the Supreme Court of Alabama and again ordered that Alabama Power Company's post-judgment motions be denied. App. C, A-31. The Supreme Court of Alabama issued its second of two opinions on May 22, 1987. App. B, A-13. The only issue ruled on was whether the Circuit Court's refusal to grant a new trial or remittitur was supported by the record. The Supreme Court of Alabama affirmed, affirming the judgment (i.e., the amount of the judgment) for the first time. Alabama Power Company did not exercise its right to file an application for rehearing within 14 days of the opinion of May 22, 1987. See Rule 40, Ala.R.App.P. The Supreme Court of Alabama issued its certificate of judgment on June 9, 1987, and the certificate contained the assessment of the 10% damages required by § 12-22-72 when a money judgment is superseded and affirmed. App. B, A-12. The Supreme Court of Alabama did not in its opinions address the issue of the constitutionality of § 12-22-72.

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[1] "App." refers to the Appendix to the Jurisdictional Statement.

ARGUMENT

I. The Federal Claim Raised By Alabama Power Company Was Neither Properly Presented To Nor Passed Upon By The Supreme Court of Alabama

The explication of this argument requires an initial discussion of a recently announced Supreme Court of Alabama procedure colloquially known as "*Hammond* remands." On July 11, 1986, in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the Supreme Court of Alabama announced a new policy applicable to cases in which the issue of excessiveness or inadequacy of a verdict is raised on motion for new trial and on appeal. The Alabama court now requires that trial judges state in writing their reasons for granting or denying a new trial or remittitur on the ground of excessiveness or inadequacy of the verdict. If the trial judge has not written such an opinion, the Supreme Court of Alabama may remand the case to the trial judge for further consideration and for a written opinion on the issue.

The case at bar is one example of a "*Hammond* remand" case. In *Hammond*-type cases, the initial opinion of the Supreme Court of Alabama adjudicates issues relating to liability, i.e., all issues other than ones concerning excessive or inadequate damages. If the court affirms liability, if excessiveness or inadequacy of the verdict was raised as an issue in the trial court and in the appellate court, and if the trial judge did not adequately state his reasons for adjudicating the post-judgment motion, then the Supreme Court of Alabama will affirm in part (on liability) and remand with directions (for the trial judge to state reasons). For the procedure in the present case, see App. A, A-2 at A-11. The judgment of the trial court is not fully affirmed by the first opinion because the amount of damages has not yet been settled.

Alabama Power Company's application for rehearing of September 19, 1986, App. G, A-41, raised all issues previously briefed and two new issues: the constitutionality of § 12-22-72; and an Eighth Amendment claim (held by the

Supreme Court of Alabama to be untimely raised — App. B, A-13 at A-21). The issues in that application for rehearing could logically only relate to issues adjudicated by the opinion of September 5, 1986. The Supreme Court had not in September 1986 decided the damages issue, thus the judgment had not yet been wholly affirmed. As of September 19, 1986, there was no issue concerning § 12-22-72, and Alabama Power Company's argument on that issue was premature. The brief of Alabama Power Company in support of its application for rehearing implicitly recognizes that the issue was not ripe. It began its argument on the point by stating, "*If* the jury verdict is affirmed in this case, APCo, as appellant, will be subjected to [§12-22-72]." App. G, A-44 at A-63 (emphasis added). Alabama Power Company recognized that the judgment had not yet been affirmed.

The judgment was not affirmed until the opinion of May 22, 1987. App. B, A-13. That opinion did not discuss § 12-22-72 because the 10% damages statute was not drawn into issue until the amount of damages was affirmed. By failing to file an application for rehearing within 14 days of May 22, 1987, and raising the issue relative to § 12-22-72, Alabama Power Company failed to timely or properly raise the federal question it seeks to raise in this Court. Rule 40, Ala.R.App.P., provides that, "All applications for rehearing . . . must be filed with the clerk of the court within 14 days (two weeks) after the rendition of the judgment . . . "

Appellee Cantrell agrees with Alabama Power Company's assertions that the past practice of the Supreme Court of Alabama establishes that the proper procedure by which to question the constitutionality of § 12-22-72 is the filing of a timely application for rehearing after affirmance of the judgment. The judgment was not affirmed until May 22, 1987, and Alabama Power Company did not file an application for rehearing. Note that the disposition of the September 5, 1986, opinion, was "AFFIRMED, IN PART," and the disposition of the May 22, 1987, opinion was "AFFIRMED." App. A, A-22 at A-11, and App. B, A-13 at A-22.

In its Jurisdictional Statement, at page 2, Alabama Power Company twice refers to the order of May 22, 1987, as "affirming" the "judgment" or "decision" of the trial court. Then it asserts, "The penalty was not part of any appealable judgment until that time [May 22, 1987]." At page 5, it is said that the 10% damage statute "was not at issue or reduced to any appealable order until that judgment was affirmed." It is true that Alabama Power Company raised the issue in *an* application for rehearing, but appellee asserts the § 12-22-72 issue must be raised in an application for rehearing filed within 14 days after the *affirmance* of the judgment (i.e., May 22, 1987). The Alabama cases cited, at pages 5-7 of the Jursidictional Statement, for the proposition that § 12-22-72 issues are properly raised by application for rehearing are all pre-*Hammond* cases where there was just one appellate opinion, thus only one application for rehearing. In *Hammond*-type cases, the first opinion and first rehearing relate only to liability issues; there is a second opinion relative to damages, and it is only that second opinion which "affirms" the judgment. Only a second application for rehearing filed after the opinion that affirms damages can raise an issue as to § 12-22-72. Alabama Power Company failed to file such a second application for rehearing.[2] The Supreme Court of Alabama recognizes the propriety of filing an application for rehearing following the second opinion (the opinion upholding the amount of damages and *affirming* the judgment) in a *Hammond*-type case. In early September 1987, five such "second" applications for rehearing were pending in the Supreme Court of Alabama.[3]

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[2] At page 7 of its Jurisdictional Statement, Alabama Power Company argues Mississippi procedure by analogy. It claims that issues concerning Miss. Code Ann. § 11-3-23 (Supp. 1986) "are appropriately raised by way of a post-affirmative motion in that court." Again, appellee points out that Alabama Power Company filed no "post-affirmative motion" subsequent to the affirmance of May 22, 1987.

[3] *Harmon v. Motors Ins. Corp.*, Alabama Supreme Court Case Numbers 83-1406, 84-8 and 84-9, first opinion July 11, 1986, second opinion June 19, 1987; *Davison v. Mobile Infirmary*, Nos. 84-1183, 84-1231 and 84-1232, first opinion October 3, 1986, second opinion July 24, 1987; *Black Belt*

The opinion of May 22, 1987 practically invited Alabama Power Company to file a second application for rehearing to raise the § 12-22-72 issue. App. B, A-13 at A-21. Appellant even quotes this passage at page 7 of its Jursidictional Statement. "Issues regarding that provision usually arise for the first time in the appellate court and do not ripen into issues until the appellate court has affirmed a judgment for plaintiff. Such issues are normally handled by motion in the appellate court after the affirmance." Appellee asserts this statement by the Supreme Court of Alabama of its procedures supports her argument that appellant failed to properly present the federal question to the court below.

Furthermore, the Supreme Court of Alabama did not expressly pass on the federal question concerning § 12-22-72. Alabama Power Company admits "the majority opinion did not formally address appellant's claim regarding the constitutionality of § 12-22-72." Jurisdictional Statement at 6. Appellee disagrees with appellant's assertion that the opinion of May 22, 1987, "must be deemed by this Court as having implicitly upheld the constitutionality of § 12-22-72." Id. As argued above, there was no issue concerning § 12-22-72 until after the affirmance of the judgment on May 22, 1987. When a superseded money judgment is affirmed in full without condition, the affirmance damages of 10% are automatically included in the certificate of judgment. See *Chapman v. Rivers Constr. Co.*, 284 Ala. 633, 644, 227 So.2d 403, 414 (1969). Unless directed otherwise by the court, the clerk of the Supreme Court of Alabama will, as a ministerial act, include the 10% damages in the certificate of judgment. This non-discretionary, ministerial act cannot be read as an explicit or implicit ruling by the Supreme Court of Alabama on the issue of the constitutionality of § 12-22-72.

Wood Co., Inc. v. Sessions, No. 84-1222, first opinion October 3, 1986, second opinion June 30, 1987; *Reinhardt Motors, Inc. v. Boston*, No. 85-6, first opinion October 3, 1986, second opinion May 15, 1987; *Dependable Ins. Co. v. Kirkpatrick*, No. 85-1150, first opinion May 1, 1987, second opinion June 26, 1987. The status of these cases is a matter of public record from the Clerk of the Supreme Court of Alabama.

Appellant has failed to affirmatively demonstrate that the federal question sought to be reviewed was timely and properly raised in and expressly passed on by the Supreme Court of Alabama. Therefore, this appeal should be dismissed pursuant to Rule 16 of the Rules of the Supreme Court of the United States, *Illinois v. Gates*, 462 U.S. 213 (1983), and other cases cited in 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure § 4022, p. 696 (1977).

II. The Federal Question Is Not Substantial

Assuming, *arguendo*, that the issue presented by Alabama Power Company is properly before this Court, the appeal should nonetheless be dismissed for want of a substantial federal question.

A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States

The right to an appeal in a civil case is guaranteed by neither the United States nor the Alabama Constitutions; appeal is a statutory privilege.[4] The right to a civil appeal is not a fundamental interest in equal protection analysis (such as the right to vote or travel), and losing defendants who supersede a money judgment are not a suspect class (such as classifications based on race or alienage). Neither are such defendants analogous to gender-based classifications or classifications based on legitimacy such as might trigger a middle-level or heightened scrutiny. Therefore, strict scrutiny is inappropriate and the Court should review the Alabama statute under the minimal scrutiny standard or rational basis test of equal protection review appropriate to economic or social welfare statutes.[5]

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[4] *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Johnson v. Barnes*, 250 Ala. 292, 292, 34 So.2d 144, 145 (1948).

[5] See, *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948).

"Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Clements v. Fashing,* 457 U.S. 957, 963 (1982). Alabama Power Company has the burden of showing that there is no logical connection between the statutory purposes and the classification created by the statute. The Court will not hold a statute invalid on equal protection grounds merely because the classification is not perfectly drawn, the classification results in some inequality, or the statute seems to the Court to be unwise. See *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 175 (1980); *Dandridge v. Williams,* 397 U.S. 471, 485-86 (1970).

Section 12-22-72 is quoted at page 3 of the Jurisdictional Statement. Appellant is incorrect, at page 7, when it states that § 12-22-72 applies to "litigants who unsuccessfully appeal from money judgments." It is important to note that the statute applies only when the defendant secures a stay of the execution of the money judgment against him by posting a supersedeas bond.

The Supreme Court of Alabama has held that "the real purpose of Section 814 [now codified as § 12-22-72] was to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered." *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 180 (1950). This purpose was recognized as early as 1823 when the court in *Heart v. Judson,* Minor 135 (Ala. 1823) (assessing the statutory 10% damages) wrote, "it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice; and

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Appellant's Jurisdictional Statement is ambiguous, but it seems to presuppose that minimal scrutiny is appropriate. At page 11, appellant argues that "§ 12-22-72 bears no rational relationship to the asserted purpose of discouraging frivolous appeals," and "there is no rational relationship between penalties assessed under § 12-22-72 and the asserted purpose of providing "compensation" to a prevailing appellee."

even in actions ex delicto, the satisfaction of the judgment should not be delayed without responsibility for damages." It has also been held that the statute "was evidently intended to penalize frivolous or delay appeals . . . ." *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920).[6]

Appellee does not understand appellant to argue that compensation to the plaintiff for the delay in collecting on a judgment is not a legitimate end, appellant just argues that "§ 12-22-72 is simply a penalty on a penalty and is not compensatory to plaintiff-appellees in any sense." Jurisdictional Statement at 8. The 10% affirmance damages statute is rationally related to the legitimate purpose of compensating plaintiff-appellees for the denial of their right to their property during the pendency of an unsuccessful appeal. The legislature could rationally determine that a blanket rule for 10% damages was preferable for judicial economy to the alternative of having a post-affirmance "mini-trial" in each case to determine the actual damage to each individual plaintiff-appellee.

Again, it is crucial to understand that § 12-22-72 does not punish the taking of an appeal by a losing defendant. It only applies if the defendant, after a full trial, chooses to prevent the plaintiff from executing on the judgment by the filing of a supersedeas bond. The legislature could rationally decide that judgment interest does not adequately compensate the plaintiff. For example, in personal injury cases, plaintiffs are often in desperate need for cash for medical expenses and family needs; yet a long appeal may delay collection from the defendant. Judgment interest cannot compensate for these personal — as opposed to purely economic — difficulties suffered by many plaintiffs. In

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[6] The Court's opinion in *Burlington Northern R.R. Co. v. Woods,* ___ U.S. ___, 94 L.Ed.2d 1 (1987) recognized these two purposes of the Alabama statute. It is also interesting to note that the Court's opinion — that § 12-22-72 is not applicable in federal diversity cases — necessarily decided that the Alabama statute was procedural and did not touch on substantive rights.

many cases defendants can earn more compound interest on plaintiffs' money until the judgment is fully paid and simple judgment interest added.

The classification created by § 12-22-72 is not irrational, it has a quid-pro-quo quality. Just as there is no constitutional right to an appeal, there is no constitutional right to supersedeas if a statutory appeal is provided. In *Louisville & Nashville R.R. Co. v. Stewart,* 241 U.S. 261, 263 (1916), Justice Holmes wrote, "There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld." The *Stewart* case also upheld the application of Kentucky's 10% affirmance damages statute, and *Stewart* has been relied on by the Supreme Court of Alabama as authority for the constitutionality of § 12-22-72. *Atlanta, Birmingham & Coast R.R. v. Cary,* 250 Ala. 675, 35 So.2d 559 (1948).

Section 12-22-72 is one part of an integrated series of statutes relating to appeals. For the benefit of supersedeas, the legislature could reasonably exact a cost or burden. The legislature could rationally decide that plaintiffs must bear burdens which defendants do not, such as the pre-payment of filing fees. Another example is the fact that Alabama has not joined the national trend to allow recovery of pre-judgment interest. It is doubtful that this appellant would argue that the 1987 Alabama Legislature was acting irrationally when it enacted, in June 1987, several pieces of "tort reform" legislation which burden plaintiffs by placing caps on damages, requiring structured payments, and altering venue rules. See 1987 Ala. Acts Nos. 87-164, 181, 182, 183, 184, 185, 186, 187, 188 and 189.

Where legislatures have made distinctions similar to those made by § 12-22-72, the statutes have been found to reflect a rational balancing of competing interests. In *Empire State Ins. Co. v. Chafetz,* 302 F.2d 828, 830 (5th Cir. 1962), the court denied an Equal Protection Clause challenge to a statute which provided for the award of attorneys' fees in favor of insureds, but provided no similar relief for insur-

ance companies, relying on this Court's decisions in *Life and Casualty Ins. Co. of Tennessee v. McCray,* 291 U.S. 566 (1934), and *Farmers' and Merchants' Ins. Co. v. Dobney,* 189 U.S. 301 (1903). See *Postow v. OBA Federal Savings & Loan Association,* 627 F.2d 1370, 1386-88 (D.C. Cir. 1980) (upholding provision in Truth in Lending Act awarding attorneys' fees only to borrowers); *Devito v. Imbriano,* 30 A.D.2d 796, 332 N.Y.S.2d 577 (1972) (upholding a 20% penalty statute directed to employers not paying awards within ten days).

Alabama Power Company does not argue that deterring frivolous and delay appeals is not a legitimate state end, it argues that the statute is unconstitutionally underinclusive and overinclusive. Even if the Court finds § 12-22-72 is not rationally related to the purpose of compensating plaintiffs for the loss of the use of their property when a defendant elects to supersede, the statute is rationally related to the important state purpose of deterring frivolous and delay appeals. A "law may not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical,* 348 U.S. 464, 487 (1955).

Section 12-22-72 does not irrationally or unfairly discriminate against defendants who choose to supersede. Parties who owe a judgment have every incentive to delay payment by filing an appeal, regardless of its merits. There is also an incentive to supersede and continue to hold plaintiff's money. The incentive to prosecute even a seemingly dilatory appeal increases with the size of the judgment since the marginal cost of additional legal fees becomes quite small compared to the judgment. For losing plaintiffs, however, having already expended the cost of a trial, the further fees required for an appeal are a sufficient disincentive to taking an unmeritorious appeal. Moreover, while delay in payment of judgments extends the time before an injury is redressed, no comparable policy applies with respect to losing plaintiffs. The statute thus is rationally related to the policies it is intended to promote. Promoting

prompt payments of debts and discouraging useless appeals also promotes judicial economy. These are certainly legitimate state concerns.

The double-bond requirement on lessees struck down in *Lindsey v. Normet*, 405 U.S. 56 (1972), is not analogous to this case. At page 79, the *Normet* Court stressed that, "The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." The Alabama statute does not raise the special concern for the poor, nor does it — even as a practical matter — foreclose appeal to anyone. Recall that a defendant who does not choose to supersede does not suffer the 10% assessment. Moreover, there is no proof that great numbers of meritorious appeals are deterred by the statute. The *Lindsey* Court remarked that "the double-bond requirement *heavily* burdens the statutory right of an FED defendant to appeal." 405 U.S. at 77 (emphasis added).

The statute in *Lindsey* applied only to FED appellants (tenants). "No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination." 405 U.S. at 78. The Alabama statute applies to *all* civil defendants who choose to supersede a money judgment. The statute is directed narrowly and specifically at a class of parties which has an incentive to cause delay. The classification is reasonable: an unsuccessful defendant will tend to protract the litigation process as long as possible so that he may benefit from the funds rightfully owing to the other party. Plaintiffs who do not receive a judgment at trial do not have a similar incentive to prolong litigation. However, § 12-22-72 would apply to a plaintiff who suffered an adverse judgment on a counterclaim. Section 12-22-72 discourages frivolous and delay appeals and makes no arbitrary classification between similarly situated persons unrelated to the legitimate objec-

tives of the statute. Thus, the equal protection attack on § 12-22-72 does not present a substantial federal question.

B. The Federal Question Is Not Substantial Because the Alabama Statute at Issue Has Been Abrogated

The Supreme Court of Alabama issued its certificate of judgment (which assessed the 10% damages) on June 9, 1987. App. B, A-12. On June 11, 1987, 1987 Ala. Acts No. 87-188 became effective. Act 87-188 amended § 12-22-72 to eliminate completely the provision for 10% damages. This appeal does not present a substantial federal question because it cannot serve as precedent for later cases — no more affirmance damages will be assessed in Alabama.

C. The Mississippi Statute at Issue in Crenshaw *is Distinguishable from the Alabama Statute*

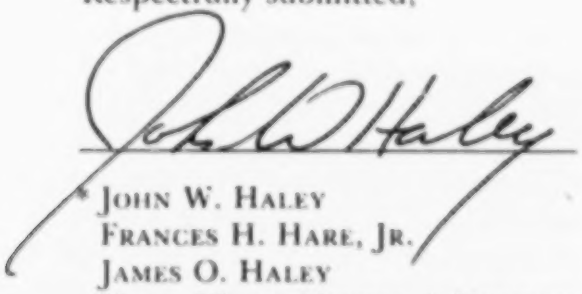
The appellant thrice in its Jurisdictional Statement cites a Mississippi case pending in this Court, *Bankers Life and Casualty Co. v. Crenshaw,* 85-1565 (probable jurisdiction noted March 9, 1987). At page 3, appellant says the § 12-22-72 issue "is closely related to similar questions . . . pending before this Court" in *Crenshaw.* Miss. Code Ann. § 11-3-23 (Supp. 1986) provides for 15% affirmance damages. It differs from the Alabama statute in several respects, but in at least one major regard: the Mississippi statute applies to *all* money judgments, not just to superseded judgments. Appellee sees this as a crucial distinction. *Louisville & Nashville R.R. Co. v. Stewart,* 241 U.S. 261 (1916) is precedent for the constitutionality of the Alabama statute, but, because it laid great stress on the fact the Kentucky statute applied only to superseded judgments, it is not authority for the Mississippi statute. See Comment, *Mandatory Assessment of Damages Against An Unsuccessful Appellant: A Constitutional Analysis,* 53 Miss. L.J. 281, 292 (1983).

Because of the differences in the Mississippi and Alabama statutes, it would not serve judicial economy or other prudential concerns for the Court to note probable jurisdiction in this case based in part on its decision to review the Mississippi case.

CONCLUSION

For the foregoing reasons, the appeal in this case should be dismissed.

Respectfully submitted,



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